



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL APPEAL NO. 7 OF 2015

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED.....APPELLANT

AND

MONICA OTIANG OLUOCH suing as administrator of estate of

IBRAHIM OBURA OLUOCH (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Achieng,

Ag. SPM at the Principal's Magistrates Court at Maseno

in Civil Case No. 65 of 2013 dated 23rd January 2015)

JUDGMENT

1. This is against quantum of damages awarded by the subordinate court. On 21st November 2011, the deceased was walking in Sinaga Village when he was electrocuted as a result of an electricity pole falling on him while it was raining. The issue of liability was settled with in the ratio 75:25 against the appellant. The matter proceeded for assessment of damages under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)* and the court made the following award in favour of the respondent which has now precipitated this appeal;

Pain and Suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs. 100,000/-
Loss of dependency	Kshs. 560,000/-
Total	Kshs. 670,000/-
Less 25%	Kshs. 609,000/-
Total Due	Kshs. 502,500/-

2. According to the particulars set out in the plaint, at the time of his death, the deceased was aged 28

years, unmarried farmer and casual labourer earning Kshs. 30,000/-. The plaintiff pleaded that the deceased's mother, Monica Otiang Oluoch, and his four brothers and two sisters were dependent on him. On the issue of damages, the deceased's brother, Elijah Oketch Oluoch (PW 1), testified that the deceased had dropped out of school in Standard 8 and was a casual labourer. He told the court that the deceased used to support their mother and pay school fees for the younger siblings. He admitted that he did not know the amount the deceased used to earn.

3. The gravamen of the appellant's appeal contained in the memorandum of appeal filed on 26th August 2016, is that the trial magistrate erred in treating the evidence and submissions on quantum superficially and failing to appreciate the principles applicable in determining damages. Mr Nyamweya, counsel for the appellant, submitted that the learned magistrate ought to have deducted the award under the **Law Reform Act** from that awarded under the **Fatal Accidents Act**. He told the court that dependency was not proved and in any case the only person entitled to depend on the deceased under the **Fatal Accidents Act** was his mother hence the dependency ratio should be reduced. He noted that in any event the respondent did not prove the existence of the deceased's mother. Mr Singahachi, counsel for the respondent, opposed the appeal and supported the award by the learned magistrate as it was based on the evidence and the applicable principles.

4. As this is an appeal on the issue of quantum and it worth reciting the general principal upon which this Court, as an appellate court, will interfere with an award of damages. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** stated that;

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low

5. The key issue in this appeal is whether the respondent proved dependency. In order to succeed, the claimant must prove that the deceased was earning some income which he used to support his dependants. Although the respondent pleaded that the deceased was earning Kshs. 30,000/-, he did not prove this fact although PW 1 testified that the deceased was a casual worker and he used to support his mother and the family. His testimony was not controverted.

6. In its submissions before the trial court, the appellant proposed a sum of Kshs. 7,000/- which the trial magistrate adopted as the minimum wage. Although the evidence was not supported by any documentation but it is now established that failure to produce documentation does not necessarily disentitle a party damages as the Court of Appeal noted in **Theta Tea Company Ltd & Another v Florence Njau Njambi NRB CA Civil Appeal No. 64 of 2000[2002]eKLR** that;

[W]here it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that be so, a lot of Kenyans would be denied substantial justice, taking into account out level of literacy and such like factors.

(see also **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR**). Moreover, since it was not disputed that the deceased was a casual, the learned magistrate was entitled to adopt the minimum wage as proposed by the appellant.

7. The level of dependency is affected by the number of deceased's dependants. The dependants contemplated under the **Fatal Accidents Act** are expressly defined under **section 4(1)** as follows;

Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall.....be brought by and in the name of the execution or administrator of the person deceased]..... [Emphasis mine]

8. It is clear that of the persons pleaded in paragraph 6 of the plaintiff, only the deceased's mother is a

dependant as the deceased's brothers and sisters are not dependants for purposes of the *Fatal Accidents Act*. In *Mary Nabwire Omalla v David Wachira & 2 Others* NBI HCCC No. 605 of 2009 [2011] eKLR, Rawal J., stated that, "I do agree that the dependants/beneficiaries under the [*Fatal Accidents*] Act are specified under Sec. 4 (1) of the said Act. Thus I shall not consider the sisters and brothers of the deceased as the dependants of the estate." (See also *Tombe Tea Factory Limited v Samuel Araka* KSI Civil Appeal No. 185 of 2007 [2010]eKLR and *Paul Githaiga v Paul Macharia Muturi and Another* NBI HCCC No. 274 of 1990 [2001]eKLR). The result of this finding is that the dependency ratio would reduce but the trial magistrate awarded the 1/3 dependency ratio proposed by the appellant which I do not consider unreasonable in the circumstances.

9. Mr Nyamweya pointed to the fact that respondent did not prove that the Monica Otiang' Oluoch was the deceased's mother. In my view, this submission lacks merits as the testimony of PW 1 is supported by the Chiefs letter dated 11th April 2013 (Exhibit P4) in which he identified her as the deceased's mother. This is ample proof, on the balance of probabilities, that Monica Otiang' Oluoch was the deceased's mother. In light of the findings I have made, it follows then that the use of a dependency ratio of 1/3 was not unreasonable in the circumstances as the learned magistrate accepted that most of the dependants were adults and could not have been dependent on the deceased.

10. The appellant complained that the learned magistrate failed to deduct the sum awarded for loss of expectation of life under the *Law Reform Act* from the sum awarded under the *Fatal Accidents Act*. This submission is erroneous and I would do note better than quote what the Court of Appeal stated in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR that;

[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

11. All in all, the learned magistrate adopted the submissions made by the appellant and there is no reason for it to complain about the judgment.

12. The appeal is dismissed with costs to the respondent.

DATED and DELIVERED at KISUMU this 30th day of September 2016.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed by L. G. Menezes and Company Advocates for the appellant.

Mr Singahachi instructed by Kuke and Company Advocates for the respondents.